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Candor to Court and Client

The Role of "Bad Cases" in Good Law

IMAGINE A SITUATION in which you are before a court and are arguing whether the respective cases cited by you and your opponent are controlling in the present litigation. Your opponent apparently has not done all his research, and you know that there is an Arizona case on point, adverse to your position, that could sway the court to find against you. What should you do?

You may be interested to know that ER 3.3(a)(3)¹ states that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Stated another way, all lawyers have a duty to candidly present to the court pertinent controlling legal authority bearing on the issues at hand.²

It is generally acknowledged that legal argument based on a knowingly false representation of law constitutes dishonesty toward a tribunal. An advocate has a duty to disclose directly adverse authority in the controlling jurisdiction, even if it has not been disclosed by the opposing party.³

"Controlling jurisdiction" means Arizona, the Ninth Circuit and, obviously, the U.S. Supreme Court. If the case is from, say, Florida, you probably do not have a duty to cite it to an Arizona court.

A recent disciplinary case from Indiana demonstrates how much trouble a lawyer can get into by trying to ignore unfavorable authorities. In *In re Thonert*,⁴ the lawyer advised his prospective client that he would be allowed to withdraw a previous guilty plea to a drunk driving charge because there was no evidence he had affirmatively waived his rights. The lawyer cited a 1989 case from Indiana establishing this principle but neglected to tell the client that the case had been overruled in 1995 in another case in which the same lawyer had represented another drunk-driving defendant. The client was impressed with the lawyer, decided to contest his guilty plea and paid the lawyer a retainer of \$5,000.

Neither the lawyer nor the prosecutor cited the 1995 case as the matter went through the courts. The Indiana Court of Appeals found the case on its own, rejected the lawyer's argument and then referred the matter to the disciplinary commission. The Indiana Supreme Court upheld the lawyer's reprimand and admonishment for violating Indiana's versions of ER 3.3(a)(3). It held that the lawyer, having been one of the lawyers in the 1995 case that overruled the

1989 case he had argued was controlling, obviously had "an intimate familiarity" with the controlling authority. The fact that the prosecutor had not cited the case was irrelevant. At a minimum, the court suggested, the lawyer ought to have cited the 1995 case and argued either that its holding was not controlling or that the holding should be changed or extended.

That wasn't the end, however. The court also held that the lawyer had violated Rule 1.4(b), which requires counsel to explain matters so that the client can make an informed decision concerning his case. The court found that the lawyer had not

told his client about the 1995 case either and had effectively divested his client of the opportunity to intelligently assess the legal environment in which his case would be argued and to make informed decisions regarding whether to go forward.

The moral of this story is that by attempting to hide a "bad case" from the court or your client, you run the risk of violating your duty of candor to a tribunal and your duty to communicate effectively with your client. This could result not only in disciplinary action but in claims of professional negligence as well.

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ENDNOTES

1. Rule 42, ARIZ.RS.Ct.
2. STUART, THE ETHICAL TRIAL LAWYER § 2.6 (1994).
3. See generally Floyd, *Candor Versus Advocacy: Court's Use of Sanctions To Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035 (1995); Lischkoff, *Recent Decisions on Citing Authorities to Courts: Model Rule 3.3(a)(3) of the Model Rules of Professional Conduct*, 19 J. LEGAL PROF. 315 (1994).
4. 733 N.E.2d 932 (Ind. 2000).

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